Case referred to:—

(1) *Evelyn Saw Hee Li* v. *Gan Tit Sun* [1959] M.L.J. 146.

CIVIL APPEAL.

Jag-Jit Singh for the appellant.

Wong Sai Heng for the respondent.

Rigby J. delivering oral judgment: This is an appeal from a decision of the learned President of the Sessions Court, whereby he gave judgment for the plaintiff that as owner of the piece of land known as Lot 180(1) T.S. 3, N.E.D., Penang, he was entitled as against the present appellant to an order for possession of that piece of land. The learned President held that on the pleadings as they stood before him he was bound by the decision of this Court in the case of *Evelyn Saw Hee Li* v. *Gan Tit Sun*(1). In that case I held that land, *qua* land, did not come within the definition of premises and could not, therefore, come within the protection of the Control of Rent Ordinance. Mr. Jag-Jit Singh, for the appellant, would seek to argue that that decision does not apply where the land, when originally let, was vacant land and where, thereafter, a building of a permanent character has been built thereon with the knowledge and consent, whether express or implied, of the landlord. Mr. Jag-Jit Singh would seek to contend that in such a case the building, having become affixed to the realty, becomes "premises comprised in a tenancy" and, therefore, comes within the Control of Rent Ordinance, 1956.

Speaking for myself, I should have been glad to have heard that argument and, indeed, glad to have been in a position, if necessary, to allow a further appeal from this Court on this point which is, in my view, a matter of very considerable practical interest and importance. But unfortunately, it seems to me that on the pleadings that argument is no longer available to the appellant and that he must be bound by the pleadings as they stand.

By paragraph 12 of the Statement of Claim it was averred that the land, when originally let, was vacant land and there has since been erected thereon a building of a temporary character known as No. 83-C, York Road, Penang, which is at present occupied by the appellant. The appellant, by his Statement of Defence, has not attempted to deny or traverse the correctness of those averments. All that he has said is that he is the occupier of the house known as No. 83-C, York Road. In the absence of any denial it must, I think, be assumed, as a matter of pleading, that the appellant admitted that the land was vacant when originally let and that he admitted that the building subsequently erected thereon was a building of a temporary character. Mr. Jag-Jit Singh, as I understand it, concedes that if, in fact, the building was of a temporary character then he would have no argument that it came within the provisions of the Control of Rent Ordinance. It seems to me perfectly clear on the pleadings that the sole issue before the learned President was a claim for possession of land, *qua* land. The appellant, by his Statement of Defence, refers therein to his attempts to pay the ground rent.

In my view, on the pleadings as they stood before the learned President he was correct in holding that he was bound by the decision of this Court, and on the pleadings as they stood he was correct in giving judgment for the plaintiff for possession of that piece of land which he claimed. The appellant cannot now raise issues of fact which were never pleaded before the trial Court. The appeal must accordingly be dismissed with costs.

Appeal dismissed.

Solicitors: *Jag-Jit Singh; Lim Kean Siew.*

HO CHOOI SOON v. THE INDIAN OVERSEAS BANK LTD.

[O. C. J. (Rigby J.) February 5, 1960]

[Penang — Civil Suit No. 220 of 1959]

Bank and Banking — Cheque — Conversion — Forged indorsement — Proceeds of cheque paid into customer's account under mistake of fact — Notice of forgery — Delay — Whether precludes banker from debiting customer's account — Bill of Exchange Ordinance, 1949, ss.29 and 82.

Practice and Procedure — Order 14 — Unconditional leave to defend.

In 1957 the plaintiff paid an uncrossed cheque to the credit of his account with the defendant Bank. The cheque was drawn by an Insurance company in favour of one Yeo Wee Yang, whose purported endorsement was guaranteed by the Secretary of the company. The plaintiff endorsed on the cheque and stamped it with the words "Endorsement Guaranteed". The defendant Bank crossed it specially to itself after it had received it for collection, and credited the proceeds to the plaintiff's account. Two years later they were informed by the solicitors of the Insurance company that the indorsement of the payee Yeo Wee Yang was forged and that they demanded repayment of the proceeds of the cheque as true owners thereof. In the event plaintiff's account was debited. Consequently the plaintiff instituted proceeding's against the defendant Bank claiming damages for wrongful conversion; in the alternative, he claimed repayment.

On a summons under O. 14 the Registrar gave leave to the plaintiff to sign final judgment against the defendant Bank for the amount claimed. The defendant Bank appealed.

Held: the defendant Bank were entitled to debit the plaintiff's account with the value of the cheque and the appeal ought to be allowed and they be given unconditional leave to defend the action.

Cases referred to:—

(1) *The London & River Plate Bank Ltd.* v. *The Bank of Liverpool Ltd. & Ors.* [1896] 1 Q.B. 7.

(2) *Capital & Counties Bank Ltd.* v. *Gordon* [1903] A.C. 240.

(3) *Bavins, Junr. & Sims* v. *London & South Western Bank Ltd.* [1900] 1 Q.B. 270.

(4) *The Imperial Bank of Canada* v. *Bank of Hamilton* [1903] A.C. 49.

APPEAL FROM THE REGISTRAR.

The following facts are taken from the judgment of Rigby J.: On May 20, 1957, the plaintiff paid a cheque for $3,243.87 to the credit of his account with the defendant Bank. The cheque, dated May 13, 1957, was drawn on the Hongkong & Shanghai Banking Corporation by

the American International Assurance Co. Ltd., (hereafter referred to as "the Assurance Co.") and made in favour of one Yeo Wee Yang. It was endorsed with the name "Yeo Wee Yang" and that endorsement was guaranteed by the signature "Lim Swee Beng" purporting to sign as Secretary on behalf of the "American International Assurance Co. Ltd. (Penang Branch)". The only other markings on the bank of the cheque are the stamped words "Endorsement Guaranteed" appearing over the signature of the plaintiff, Ho Chooi Soon. Finally the cheque was specially crossed by the defendant Bank itself after it had received it from the plaintiff for collection.

According to paragraph 4 of the Statement of Claim, on the same day, May 20, the defendant Bank collected payment on the cheque and credited the proceeds to the plaintiff's account with the said Bank.

On June 26, 1959, the defendant Bank debited the amount of the said cheque in the plaintiff's account and drew out the same amount. On September 22, 1959, the plaintiff accordingly instituted proceeding against the defendant Bank claiming damages for wrongful conversion; in the alternative, he claimed a repayment of the money as money had and received by the defendant Bank to the use of the plaintiff.

On September 30, the defendant Bank entered an appearance in the action.

On October 6, the plaintiff took out a Summons under Order 14, duly supported by the requisite affidavit, asking for leave to sign final judgment on the ground that there was no defence to the action.

On October 10, the defendant Bank filed their defence to the action, and on October 12, the Penang Manager of the defendant Bank filed an affidavit showing cause why the application for leave to enter final judgment should not be granted.

The defence put forward by the defendant Bank was that on June 4, 1959, they had received a letter from a firm of Solicitors in Singapore, acting on behalf of the Assurance Co., claiming that the endorsement on the cheque of the payee, Yeo Wee Yang, was forged, and demanding repayment of the proceeds of the cheque as the true owners thereof.

On September 7, the defendant Bank received a further letter from the Solicitors repeating the claim of their clients, the Assurance Co., for repayment of the proceeds of the cheque as the true owners, and stating that the endorsement by the payee, Yeo Wee Yang, on the cheque had been forged in the following circumstances. Yeo Wee Yang had held a life or endowment insurance policy with the Assurance Co. The policy matured due for payment on July 1, 1957. In May, 1957, Yeo Wee Yang applied for payment of the policy. The Assurance Co. discounted a small amount by reason of the application for payment being made before the due date of payment, and forwarded to Yeo Wee Yang, through their Penang Agent, one Lim Swee Beng, a cheque payable to Yeo Wee Yang or order. Yeo Wee Yang refused to accept the cheque, returned it to Lim Swee Beng, the Assurance Co.'s Penang Agent, and demanded full payment. On June 28, a further cheque for the full surrender value of $3,270 was duly forwarded to Yeo Wee Yang from the Assurance Co.'s Singapore Office and he, in due course, collected payment thereon. In the meantime, however, the original cheque for $3,243.87, which Yeo Wee Yang had refused to accept, had been misappropriated by Lim Swee Beng in Penang. It was alleged in the letter that Lim Swee Beng had forged the signature of Yeo Wee Yang and endorsed it to a third party. Apart from the signature "Yeo Wee Yang" appearing as an endorsement on the cheque, and the guarantee of that endorsement by Lim Swee Beng, the only other endorsement on the cheque was the signature of the plaintiff appearing immediately below the stamped words "Endorsement Guaranteed". The plaintiff, by his Statement of Claim, averred, that he was a holder in due course; that is to say, he averred, in the words of section 29(1)(b) of the Bills of Exchange Ordinance, "that he took the bill in good faith and for value and that at the time the bill was negotiated to him, he had no notice of any defect in the title of the person who negotiated it."

The Assurance Co's Solicitors, by their letter of the 7th September, 1959, to the defendant Bank claimed:— "As Mr. Yeo Wee Yang never at any time accepted the cheque No. S. 37283 for $3,243.87, the ownership in that cheque never passed from our clients to Mr. Yeo Wee Yang and as it was misappropriated by Lim Swee Beng, he not being entitled to the cheque could not have passed the title to any person he endorsed the cheque. The ownership therefore is in our clients, who are the true owners of that cheque". The letter concluded with the paragraph:— "We trust that now you are aware of these facts you will advise your clients to settle our clients' claim and that we may expect to receive from you your cheque for $3,243.87."

The defendant Bank, by their defence, admitted that on June 26, 1959, they debited the plaintiff's account with the value of the cheque. They maintained, however, that they were justified in so doing when they were informed by the Solicitors of the Assurance Co., by their letter dated June 4, that the endorsement of the payee, Yeo Wee Yang, was forged and that the Assurance Co. were entitled to the proceeds of the cheque as the true owners thereof. They maintained that they were holding the money as stakeholders. In that capacity, on September 11, 1959 — and before the issue of the Writ in this action — they filed an Interpleader Summons calling upon the rival claimants to put forward their respective claims to the proceeds of the cheque. The plaintiff, with full notice and knowledge that those interpleader proceedings were in being, nevertheless proceeded to issue the Writ in this action.

The plaintiff's Summons for leave to sign final judgment came before the learned Registrar for hearing on October 13. After hearing argument he gave leave to the plaintiff to sign final judgment against the defendant Bank for the amount claimed of $3,243.87, as money had and received by the defendant Bank to the use of the plaintiff.

R. D. Hume for the appellants (defendants).

Lee Thean-Chu for the respondent (plaintiff).

Rigby J.: This is an appeal from a decision of the learned Registrar, made under Order 14 of the Rules of the Supreme Court, giving the respondent, Ho Chooi Soon (to whom I will here after refer as "the plaintiff") leave to sign final judgment against the appellants, the Indian Overseas Bank Ltd., (to whom I will hereafter refer as "the defendant Bank") for the sum of $3,243.87, and costs.

[His Lordship stated the facts as reproduced above and continued:]

The main argument advanced before the learned Registrar was that whilst it was conceded that the payment of money made under a mistake of fact as to the instrument itself can be recovered by the payer, a condition precedent to such recovery was that the mistake should be discovered at once and repayment claimed at once. In support of that argument reliance was placed on the case of *The London & River Plate Bank Ltd.* v. *The Bank of Liverpool Ltd. & Ors.*[1] The headnote of that case reads:—

"When a bill becomes due and is presented for payment, and is paid in good faith and the money is received in good faith, if such an interval of time has elapsed that the position of the holder may have been altered, the money so paid cannot be recovered from the holder, although indorsements on the bill subsequently prove to be forgeries."

It was contended that the plaintiff was a holder in due course of the cheque; that the defendant Bank debited his account two years after the proceeds had been collected by them and paid into his account; and that they did this simply on the strength of the correspondence from the makers of the cheque who claimed to be the true owners of the cheque and entitld to the proceeds thereof.

I must confess that I find the case to be one of considerable difficulty and complexity. At first sight it certainly seems a startling proposition that a Bank, two years after it has collected the proceeds of a cheque paid by a customer into his account and credited the customer with that amount, should claim the right to debit the customer with that amount simply on the representation of the makers of the cheque that it was a forgery.

Since the hearing of the appeal I have also had the advantage of hearing the arguments of both counsel on the defendant Bank's application for an order for interpleader proceedings. Two factors are now clear and indisputable as a result of those arguments. First, there can be no doubt that the cheque in question was misappropriated by Lim Swee Beng and the endorsement thereon of the name of Yeo Wee Yang was, in fact, a forgery. Secondly, Mr. Hume, for the defendant Bank, made it clear that the cheque was not crossed when the defendant Bank received it, but that the defendant Bank crossed it specially to itself after it had received it for collection. That being so, since the endorsement of the name of the payee on the cheque was a forgery, and since the defendant Bank was not able to avail itself of the protection afforded to collecting Banks by section 82 of the Bills of Exchange Ordinance in the case of crossed cheques, then the defendant Bank, in collecting payment on the cheque was, *prima facie*, guilty of conversion and was liable to an action for conversion, or for money had and received for their use, at the instance of the true owners of the cheque, the American International Assurance Co. Ltd. (See *Capital & Counties Bank Ltd.* v. *Gordon*).[2] The defendant Bank must have found itself in a position of some difficulty when it received the correspondence from the Solicitors of the Assurance Co., claiming that they were entitled, as true owners, to the cheque and entitled to its proceeds. On the strength of that correspondence, and in the absence of any proceedings having yet been instituted against them, were the defendant Bank entitled to debit the account of the plaintiff, on whose behalf, two years previously, and acting as his collecting agents, they had collected the money from the Assurance Co.'s account with the paying Bank, and paid it into his account? In the absence of any authority to guide me I would have been impelled to the conclusion that it was not so entitled and that the defendant Bank, being unable to avail itself of the protection afforded by section 82 of the Bills of Exchange Ordinance by reason of the fact that it had failed to ensure that the cheque was crossed by its customer before passing it for collection, was not entitled to take advantage of its own want of precaution by debiting the customer's account after collection.

"A banker cannot dishonour his customer's cheque upon a mere claim by a third person to the moneys standing to the credit of the account; otherwise the banker would often be set the task of conducting a judicial inquiry into the rights of parties. The person claiming the moneys should obtain an injunction restraining the bank from honouring the customer's drafts". (See *Grant's Law of Banking*, 7th Edition, page 97). By analogy, it would seem to me that when a Bank, as a collecting agent for a customer who has presented a cheque for collection, has received the money due and credited it to its customer's account, it could not subsequently, on the representation of a third party — albeit, the drawer of the cheque — that the cheque was a forgery, debit the customer's account with the proceeds already collected and paid in. To act in such a manner appears to me to be an attempt by the Bank to absolve itself of its own want of precaution in failing to ensure that the cheque was crossed generally or specially by the customer to himself before it was presented by him to the Bank for collection.

But Mr. Hume, for the defendant Bank, has referred me to the case of *Bavins, Junr. & Sims* v. *London & South Western Bank Ltd.*[3] The headnote of that case is as follows:—

"The plaintiffs received from a company, which was indebted to them, an order addressed to the company's bankers for the payment of the amount of their debt. The order was not a cheque within the meaning of the Bills of Exchange Act, 1882, because the payment was made conditional upon signature of a receipt appended to the order. The order was stolen from the plaintiffs, the receipt being then unsigned. It was subsequently handed to the defendants, a banking company, with a forged endorsement and receipt thereon, for collection on behalf of a customer of theirs when they credited with the amount of it. It did not appear that the customer knew that the order had been stolen. The order was presented by the defendants to the bank to which it was addressed, and the amount specified therein was thereupon paid by that bank to them. Subsequently, the plaintiffs gave notice to the defendants that the order was stolen from them, and claimed the amount received by the defendants upon it. Nothing had in the meantime taken place to debar the defendants from cancelling the credit given to their customer as beforementioned:—

Held, that the plaintiffs were entitled to recover the amount received by the defendants upon the order as money received for the plaintiffs' use."

In the course of his judgment in that case A. L. Smith L.J. said, at page 275:—

"It was argued that the defendants, being merely agents for their customer, and having in effect paid the money over to her before they had notice of the plaintiffs' claim, an action for money had and received will not lie against them. But all they really did was to credit the customer with the money, and I see no reason why they could not have debited the customer with the amount upon its being shown that she had no title to the document, and that it belonged to the plaintiffs."

Collins L.J. at page 277, said:—

"They have wrongfully so dealt with a document belonging to the plaintiffs that they have received its full face value; and I think that the result is that the

money so received by them by reason of that wrongful user of the plaintiffs' document can be treated as money received by them to the use of the true owners of the document. That being so, what is the answer which the defendants set up to the claim of the plaintiffs for the money belonging to them which the defedants have in their hands? The only answer which they set up appears to be the fact that they have credited their customer with the amount of it. Apart from any other argument, the answer which the plaintiffs' counsel made to this appears to me conclusive, namely, that a credit so given to a customer by a bank is in its nature provisional only, and depends upon the question whether the cheque or other document finally results in a right to recover and retain the money. The customer is only credited with the amount subject to the risk of that afterwards turning out not to be so. There does not appear in this case to have been any settlement of account between the defendants and their customer which debarred them from recovering from their customer the amount with which they had credited her."

Lastly, Vaughan Williams L.J. at page 278, said:—

Although the customer had been credited with the amount received by them, it was merely a provisional credit, and there had been no such settlement of accounts between them as disentitled the defendants as against their customer to strike out the credit."

The conclusion drawn from this judgment is formulated in the passage appearing in *Halsbury's Laws of England*, 3rd edition, Volume II, page 209 in the words:—

"A collecting banker is not precluded from debiting his customer with money he has paid him as the proceeds of a negotiable instrument should the banker have to account for them to the true owner."

Whilst it is perfectly true that two years have passed since the money was credited to the plaintiff's account and that during that time there have been numerous payments in and payments out of that account, in the words of Collins L.J. there does not appear to have been any settlement of account between the plaintiff and the defendant Bank which debarred the defendant Bank from recovering from its customer the amount with which it had credited him. Nor has the plaintiff been prejudiced by being precluded by the passage of time from any right of recourse he might have had against a prior holder in due course of the cheque, since it is manifest that the prior endorsement upon the cheque was itself a forgery so that no valid title to the instrument could have been passed to him.

On the authority of *Bavins' case* I am driven to the conclusion that the defendant Bank were entitled to debit the plaintiff's account with the value of the cheque and that this appeal ought to be allowed and the defendant Bank given unconditional leave to defend this action.

There is another aspect of the matter to which I ought to have made earlier reference and which, in itself, may well provide an unanswerable reason as to why the defendant Bank ought to have been given unconditional leave to defend this action.

The plaintiff's claim is based upon the contention that in accordance with the provisions of section 29(1)(b) of the Bills of Exchange Ordinance he was a holder in due course of the cheque paid by him into the defendant Bank for collection and payment of the proceeds into his account. That averment in paragraph 3 of his Statement of Claim that he was a holder in due course is clearly refuted by the defendant Bank, both by the affidavit filed in answer to the application for final judgment under Order 14, and, in its written defence to the action, by allegations of fact, which state clearly and unequivocally that the issue and/or subsequent negotiation of the cheque was effected with fraud. The plaintiff has not attempted to traverse or deny those allegations. That being so, the legal presumption that he was a holder for value of the cheque was, in my view, clearly displaced and under section 30(2) of the Bills of Exchange Ordinance the burden of proof shifted to the plaintiff to prove that subsequent to the alleged fraud value in good faith had been given by him for the cheque. On this ground alone I think the defendant Bank ought to have been given unconditional leave to defend the action.

Before parting with this appeal I ought, perhaps, to refer to the case of *The London & River Plate Bank Ltd.* v. *The Bank of Liverpool Ltd. & Ors.*[1] which, I think, clearly influenced the learned Registrar in giving judgment for the plaintiff. Like the learned Registrar, I was originally of the opinion that that judgment was conclusively in favour of the plaintiff and that the defendant Bank, by its delay, was precluded from recovering payment from the plaintiff. In that case the plaintiff bank was seeking to recover from the defendant bank, who were holders in due course for value, the amount of a draft which had been accepted by the plaintiff bank and which they had paid, but which they alleged they had paid under a mistake of fact. It appeared, a long time after payment had been made, that the endorsements on the draft were forgeries. It followed that the plaintiffs were not liable upon the draft at the time they had paid it. But the defendant bank had admittedly become possessed of the bill, as holders in due course for value, and were ignorant of the fact that the endorsements were forged. Mathew J. for the reason already quoted from the headnote of the case, dismissed the plaintiff bank's claim. That decision was criticised by the Privy Council in the later case of *The Imperial Bank of Canada* v. *Bank of Hamilton*[4] as too sweeping. The contrasting effect of the two decisions is concisely summarised in *Paget's Law of Banking*, 5th edition, at page 243. The gist of the decision in the former case was that money paid on a negotiable instrument to an innocent person could not be recovered if he had the money in his possession for such a period that his financial position might, not necessarily would, be effected if he had to refund. On the other hand, the view taken by the Privy Council was that the money could be recovered unless the recipient, by lapse of time, had lost his remedy against some previous party by being deprived of the opportunity of giving notice of dishonour. Accepting the latter view it is, I think, abundantly clear that the plaintiff, by lapse of time, had not lost any remedy against any previous party by being deprived of the opportunity of giving notice of

dishonour for the simple reason that, the prior endorsement being a forgery, there was no previous party to whom he could effectively give notice of dishonour. But Mr. Hume has contended, and, I think, correctly, that the principles enunciated in these two cases are strictly inapplicable since they deal with the position where the relationship between the immediate parties is that of a holder in due course whereas, in the instant case, the relationship between the defendant Bank and the plaintiff was simply that of a Banker acting as agent for his customer for the purpose of collecting the proceeds of a cheque and paying it to the customer's account. There was no question of the defendant Bank having accepted the cheque as a holder in due course from the plaintiff. It seems to me, therefore, that the principle laid down in *The London & River Plate Bank's case*, which at first appeared to me to be conclusively in favour of the plaintiff, is not strictly relevant for consideration on the facts of this case where the relationship between the parties was simply that of a collecting Bank acting as agent on behalf of its customer. For these reasons I am of the opinion, and I so order, that this appeal be allowed, with costs, and that the defendant Bank should be given unconditional leave to defend the action. Mr. Hume informed the Court that the defendant Bank was prepared to pay the amount involved into Court pending the determination of the matter. I do not think, however, that it is necessary for me to make any such order to that effect as a condition precedent to the defendant Bank being given leave to defend the action.

Appeal allowed.

Solicitors: *Hogan, Adams & Allan; Lee Thean-Chu.*

ANG TENG HAI v. REGINA

[A. C. J. (Rose C.J.) April 27, 1960]

[Singapore — Magistrate Appeal No. 206 of 1959]

Children and Young Persons Ordinance (Cap. 128), s.55(2) — Sentence of imprisonment not to be ordered — Fine — Quantum of.

Under section 55(2) of the Children and Young Persons Ordinance — "A young person shall not be ordered to be imprisoned for an offence, or to be committed to prison in default of a fine, damages or costs, unless the Court . . . . . ."

In this case the 1st appellant was a boy of some 15 years of age. He was amongst a group of six persons who were arrested as a result of police raid upon certain premises in which it was alleged a public lottery was carried on. Four of the six accused were acquitted, the present appellants only being convicted. The 1st appellant was sentenced to a fine of $3,000 in default a sentence of 3 months' imprisonment.

In exercise of his powers under section 299(c) of the Criminal Procedure Code, the learned Chief Justice altered the sentence by the deletion of the term of imprisonment in default.

MAGISTRATE'S APPEAL.

L. Rayner for the appellant.

A. W. Ghows (Deputy Public Prosecutor) for the respondent.

Rose C.J. (after dealing with the facts affirmed the conviction and continued): A point arises as to sentence. A fine of $3,000 was imposed, in default a sentence of 3 months' imprisonment. Learned counsel for the appellant points out — and it is conceded by learned Crown Counsel — that the sentence of imprisonment is not in accordance with the law, having regard to the provisions of section 55(2) of the Children and Young Persons Ordinance (Chapter 128).

In exercise of my powers under section 299(c) of the Criminal Procedure Code, I therefore alter the sentence by the deletion of the term of imprisonment in default.

As to the quantum of the fine, while it is true that the appellant is only a boy, the fact that he is the son of the man who controls the premises and who in fact may well have been fortunate at the actual time of the raid on that particular night in escaping implication in the management of the lottery, I consider that a substantial fine is in keeping with the circumstances of the case.

The fine, has, I am informed from the Bar been paid in full; the question therefore of any alternative punishment under section 62(1)(f) of the Children and Young Persons Ordinance is no longer important.

As far as this appellant is concerned, therefore, the appeal is dismissed and the conviction and sentence affirmed, subject to the deletion of the term of imprisonment in default.

As regards the 2nd appellant, he was alleged at the time of the Police raid to be actually holding in his hand a pad of papers containing records of stakes. His case, is therefore distinguishable from that of the other accused who were acquitted in the Court below, who were not alleged to have been taking any active part (at the moment of the raid) in the carrying on of the lottery.

This appellant made a statement, not on oath, in which he said that he was visiting the premises in order to make a purchase of some wire netting. Having regard to the hour — 8.45 p.m. — it is not surprising that the learned Magistrate rejected this explanation of the 2nd appellant's presence at the scene. Whether or not he was actually holding the papers alleged is a pure question of fact, eminently for the decision of the Magistrate.

It would, in my opinion, be wrong for me to interfere with the learned Magistrate's finding on the facts in this matter and the conviction must be affirmed.

As to sentence, a fine of $2,500 was imposed, in default a term of three months' imprisonment.

This fine was not paid and I am informed from the Bar that the appellant underwent a spell of 18 days' imprisonment pending this appeal. This appellant, a young man of 23, is, I am informed, a vegetable seller and a person of small substance. Moreover, it would seem that he played no prominent part in the management of the lottery that was undoubtedly being